

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: February 13, 2007)

DO NOT PUBLISH

JANET ABRUZZO,	)	
mother and next friend of her daughter,	)	
ANNA ROSE ABRUZZO,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 02-0857V
	)	Decision on the Record;
SECRETARY OF	)	Dismissal
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

DECISION<sup>1</sup>

Petitioner, Janet Abruzzo (Ms. Abruzzo), as next friend of her daughter, Anna Rose Abruzzo (Annie), seeks compensation under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> Ms. Abruzzo filed an initial Program petition on July 19, 2002. She alleged that Annie “suffered neurological injuries” after she received a diphtheria-tetanus-acellular pertussis (DTaP) vaccination on July 20, 1999. Petition (Pet.) at 1. Ms. Abruzzo filed an amended Program petition on November

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<sup>1</sup> As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

<sup>2</sup> The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

5, 2004. She alleged that Annie “suffered mercury toxicity” related to “thimerosal-containing vaccines.” Amended Petition (Am. Pet.) at 1.

On October 27, 2005, Chief Special Master Gary Golkiewicz transferred the case to this special master. *See Abruzzo v. Secretary of HHS*, No. 02-0857V, Order of the Chief Special Master (Fed. Cl. Spec. Mstr. Oct. 27, 2005). This special master reviewed thoroughly the amended petition and the exhibits. This special master convened an informal, yet substantive, status conference on January 11, 2006. He discussed comprehensively the posture of the case. He directed Ms. Abruzzo to consult a medical expert for an evaluation of the case. *See Abruzzo v. Secretary of HHS*, No. 02-0857V, Order of the Special Master (Fed. Cl. Spec. Mstr. Jan 11, 2006).

On December 20, 2006, Ms. Abruzzo stated that her attorney had “received a preliminary report from [a] pediatric neurologist.” Petitioner’s Status Report, filed December 20, 2006, ¶ 2. Ms. Abruzzo represented that she and her attorney were “discussing the preliminary opinion.” *Id.* ¶ 3. This special master required Ms. Abruzzo to file by no later than January 19, 2007, “a status report proposing to the special master a schedule for additional proceedings, such as the submission of the pediatric neurologist’s opinion.” *Abruzzo v. Secretary of HHS*, No. 02-0857V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Dec. 27, 2006).

On January 19, 2007, Ms. Abruzzo stated that based upon the pediatric neurologist’s “preliminary report,” her attorney had explained “several options” for further proceedings. Petitioner’s Status Report, filed January 19, 2007, ¶ 2. Ms. Abruzzo represented that she continued to assess the information. *See id.* This special master required Ms. Abruzzo to file by no later than February 9, 2007, “a status report proposing to the special master a schedule for additional proceedings, such as the submission of the pediatric neurologist’s opinion.” *Abruzzo v. Secretary of HHS*, No. 02-0857V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Jan. 22, 2007).

On February 9, 2007, Ms. Abruzzo moved for a ruling on the record. *See* Petitioner’s Motion for a Ruling on the Record (Motion), filed July 26, 2006. Ms. Abruzzo notes that she has proffered 30 exhibits comprising Annie’s medical, educational and therapy records. *See* Motion at 1. She maintains that based upon his review of the exhibits, this special master “may now resolve the issue of whether” Annie’s “thimerosal-containing” DTaP “vaccine administered on July 20, 1999, more likely than not, caused [Annie] to suffer mercury toxicity and gross developmental delays.” *Id.* at 2.

A petitioner bears at least two burdens in Program proceedings: the burden of production and the burden of persuasion. The statute governing the Program requires initially a petitioner to submit with a petition particular items supporting the claim to compensation. *See* § 300aa-11(c). Then, the statute governing the Program requires a petitioner to *demonstrate* “by a preponderance of the evidence the matters” contained “in the petition.” § 300aa-13(a)(1)(A). In a case involving the actual causation standard, a petitioner must adduce “a medical theory causally connecting the vaccination and the injury;” describe “a logical sequence of cause and effect showing that the vaccination was the reason for the injury;” and mount “a showing of a proximate temporal

relationship between vaccination and injury.” *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

Congress prohibited special masters from awarding compensation “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases reason uniformly that “special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone.” *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, at \*9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998); *see also Camery v. Secretary of HHS*, 42 Fed. Cl. 381, 389 (1998).

By proffering medical records, educational records, therapy records and an affidavit, Ms. Abruzzo has met at least in part her burden of production. *See* § 300aa-11(c). However, this special master has canvassed thoroughly the medical records, educational records, therapy records and Ms. Abruzzo’s affidavit. He determines that the documents alone do not reflect an independent basis for him to find more likely than not that Annie sustained “mercury toxicity and gross developmental delays” from her July 20, 1999 DTaP vaccination, as Ms. Abruzzo contends. Motion at 2; *see also* Pet.; Am. Pet. As a consequence, Ms. Abruzzo requires unquestionably a medical expert’s opinion to establish her claim. *See* § 300aa-13(a).

Yet, Ms. Abruzzo must concede that she has not advanced a medical expert’s opinion attributing Annie’s alleged neurological condition to “mercury toxicity” from vaccination. Therefore, this special master determines that Ms. Abruzzo has not met at all her burden of persuasion. *See* § 300aa-13(a)(1)(A). Thus, this special master rules that Ms. Abruzzo has not established that she is entitled to Program compensation.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

s/John F. Edwards  
John F. Edwards  
Special Master